

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:)
Request for Regulatory)
Determination filed by) 1990 OAL Determination No. 15
the California Dental)
Hygienists Association) [Docket No. 89-022]
concerning the Board of)
Dental Examiners') November 9, 1990
statement that dental)
auxiliaries may not per-) Determination Pursuant to
form general supervision) Government Code Section
duties involving dental) 11347.5; Title 1, California
treatment procedures on a) Code of Regulations,
new patient without prior) Chapter 1, Article 3
examination of the new)
patient and specific)
instructions by a)
dentist¹)
_____)

Determination by: JOHN D. SMITH, Director

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the Board of Dental Examiners' statement that dental auxiliaries, under the general supervision of a dentist, may not perform duties involving dental treatment procedures on a new patient without prior examination of the new patient and specific instructions by a dentist is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

Though expressing no opinion as to whether the above noted statement is wise or unwise, the Office of Administrative Law concludes that it is nonetheless a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the Board of Dental Examiners' ("Board") statement that dental auxiliaries may not perform general supervision duties involving dental treatment procedures on a new patient, without prior examination of the new patient and specific instructions by a dentist, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4, 5, 6, 7, 8}

OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged Board statement is a "regulation" as defined by Government Code section 11342, subdivision (b);
- (3) the statement is not exempt from the requirements of the APA; and therefore,
- (4) the statement violates Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that statute's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to

whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The original dental statute, governing the practice of dentistry, was enacted in 1885.¹¹ Section 4 of the 1885 act provided that "within six months from the time this act takes effect, it shall be the duty of every person who is now engaged in the practice of dentistry in this state, to cause his or her name and residence or place of business to be registered with the board of examiners."¹² (Emphasis added.)

The current Board of Dental Examiners ("Board") is located within the Department of Consumer Affairs.¹³ It is responsible for carrying out the purposes and enforcing the provisions of the Dental Practice Act, Business and Professions Code sections 1600 through 1808.¹⁴ The Board's duties include examining applicants for a license to practice dentistry, issuing licenses to practice dentistry, collecting and applying all related fees, and the suspension or revocation of licenses.

In 1941, the California Supreme Court described the Board of Dental Examiners as "

"a statutory body, consisting of seven members of the profession [¹⁵] and charged with the duty of administering the provisions of the Dental Practice Act. [Citations omitted.] A similar board has existed in California since 1885 [citation] for the purpose of examining applicants and granting licenses to practice dentistry to properly qualified persons. Since 1909 the board has had the power to revoke or suspend licenses for specified causes. . . . In 1937 the Legislature revised the Dental Practice Act and sought to specify with more particularity the kind of activity which comprises 'unprofessional conduct' and thus constitutes ground for the revocation or suspension of a license by the board. . . ." ¹⁶

Additionally, the Board is responsible for the licensing of dental auxiliaries. There are five classifications of dental auxiliaries: (1) dental assistant,¹⁷ (2) registered dental assistant, (3) registered dental assistant in extended functions, (4) registered dental hygienist and (4) registered dental hygienist in extended functions. The Legislature mandates the Board to "prescribe by regulation the functions which may be performed by" dental auxiliaries.¹⁸

Authority ¹⁹

Business and Professions Code section 1614 provides in part:

"The Board may adopt reasonably necessary rules not inconsistent with the provisions of this chapter [chapter 4, sections 1600-1808, of the Business and Professions Code] concerning:

. . . .

(f) The administration and enforcement of this chapter.

"Such rules shall be adopted, amended, or repealed in accordance with the provisions of the Administrative Procedure Act. [Emphasis added.]"

Background: This Request for Determination

To facilitate understanding of the issues presented in this Determination, we set forth the following relevant statutes and regulation.

Business and Professions Code section 1625 defines "dentistry" as follows:

"Dentistry is the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malpositions of the human teeth, . . . and such diagnosis or treatment may include all necessary related procedures as well as the use of drugs, anesthetic agents, and physical evaluation. Without limiting the foregoing, a person practices dentistry within the meaning of this chapter [the Dental Practice Act] who does any one or more of the following:

(a)

(b) Performs, or offers to perform, an operation or diagnosis of any kind, or treats diseases or lesions of the human teeth

(c)

(d) Makes, or offers to make, an examination of, with the intent to perform or cause to be performed any operation of the human teeth [Emphasis added.]"

The practice of dentistry by an unlicensed person is prohibited by Business and Professions Code section 1626. Section 1626 states in part:

"It is unlawful for any person to engage in the practice of dentistry in the state, either privately or as an employee of a governmental agency or political subdivision, unless the person has a valid, unexpired license or special permit from the board. . . ." ²⁰

The Legislature, recognizing the unmet dental care needs of the general public, established classifications of dental auxiliaries which "constitute a career ladder, permitting the continual advancement of persons to successively higher levels of licensure with additional training, and without repeating training for skills already acquired." ²¹

Business and Professions Code section 1741 provides the following definitions in regard to dental auxiliaries:

"As used in this article [article 7, titled "Dental Auxiliaries," of the Dental Practice Act]:

. . . .

(c) 'Direct supervision' means supervision of dental procedures based on instructions given by a licensed dentist, who must be physically present in the treatment facility during the performance of those procedures.

(d) 'General supervision' means supervision of dental procedures based on instructions given by a licensed dentist but not requiring the physical presence of the supervising dentist during the performance of those procedures.

(e) 'Dental auxiliary' means a person who may perform dental supportive procedures authorized by the provisions of this article. [Emphasis added.]"

The Legislature also enacted Business and Professions Code sections 1751, 1754, 1757, 1759 and 1761, which mandate that the Board "shall prescribe by regulation the functions which may be performed by" (emphasis added) dental assistants, registered dental assistants, registered dental assistants in extended functions, registered dental hygienists and registered dental hygienists in extended functions, respectively. Each code section above also requires that the Board prescribe by regulation "whether such functions require direct or general supervision, and the settings within which [the dental auxiliary] may work."

These dental auxiliary "function" regulations are located in Title 16 of the California Code of Regulations ("CCR"), sections 1085 through 1089. Each "function" regulation

provides what function or activity a dental auxiliary may or may not do and what type of supervision is required for each permitted function.²²

The one "function" regulation, which is relevant in this determination proceeding and applies to all dental auxiliaries, is section 1085:

"(a) Unless specifically so provided by regulation, a [dental auxiliary] may not perform the following [function] or any other activity which represents the practice of dentistry or requires the knowledge, skill and training of a licensed dentist:

(1) Diagnosis and treatment planning
[Emphasis added.]"

On November 15, 1988, the Board submitted to OAL for publication in the California Regulatory Notice Register a notice of proposed regulatory action, which would have in part, added section 1066 to Title 16 of the CCR.²³

Proposed section 1066 stated:

"Responsibility of the Dentist Regarding Treatment of Patients:

"(a) The dentist has a continuing responsibility for determining the course and sequence of treatment for each patient.

"(b) Except as provided below, it is unprofessional conduct for a dentist to require or permit an auxiliary to perform any procedure on a patient not previously seen by that dentist unless the dentist has reviewed the patient's medical and dental history, performed a preliminary extra-oral and intra-oral examination and determined the course or sequence of treatment for the patient. A dental auxiliary may, however, perform the following duties (if permitted by law for that classification of auxiliary) prior to any examination of the patient by the dentist:

(1) Expose emergency radiographs upon direction of the dentist.

(2) Perform extra-oral duties or functions specified by the dentist.

(3) Perform mouth-mirror inspections of the oral cavity, to include charting of obvious lesions, malocclusions, existing restorations and missing teeth.

(4) Apply topical fluoride or pit and fissure sealants in any setting described in section 1088(e)(2) through (9), inclusive.

"(c) A dentist shall perform such subsequent examinations of each patient as are determined appropriate by the customary practice and standards of the dental profession."²⁴

On April 21, 1989, pursuant to Business and Professions Code section 313.1, the Board submitted the proposed adoption of section 1066 to the Director of Consumer Affairs ("Director") for review and approval. In a letter dated May 17, 1989, the Director advised the Board that, pursuant to his authority under section 313.1, the proposed adoption of section 1066 was disapproved. In his letter, the Director gave the following reasons for disapproval:

"1. There is no apparent need or justification for the change as contemplated by these regulations. This being the case, the mandated dental examination contemplated by the regulations appears to present the risk of increased cost, and possible denial of access to specified dental services particularly as [it] affects the poor, disabled and elderly, many of whom may not have a regular or family dentist and who will therefore be confronted with the economic burdens of the 'first time' dental examination provided in these regulations. In many cases these persons may merely require or desire some form of dental prophylaxis, but will not be allowed to acquire such without the full dental examination as provided in the regulation.

"2. There are other less intrusive, less burdensome and less costly alternatives to achieve the desired goal of ensuring proper supervision by licensed dentists over dental auxiliaries

"3. . . . It is the view of this Department that public health and safety will be more properly protected by a full discussion and dialogue on these issues before the appropriate legislative forum, than by adoption through the narrow and more confining processes of regulatory enactment."

After receiving the disapproval letter from the Director, the Board did not proceed with the rulemaking procedures required by the APA to complete the formal adoption of proposed regulation section 1066.

Subsequently, with a cover letter dated September 20, 1989, the Board issued the following "position statement" (the challenged rule in this proceeding) to all of its licensees:

[Cover letter]

"Dear Licensee:

"The [Board] has been made aware that illegal practices may be occurring in the dental community. It is our understanding that such practices are occurring due to confusion over the proper interpretation of current law.

"As responsible public officials we have a responsibility to inform our licensees of the provision of current law. To this end, the enclosed Position Statement is being forwarded to fully inform all dental licensees of the requirements of current law. . . ."

[Position Statement]

"The Board has discovered that some licensees believe all general supervision duties may be delegated without the dentist first examining and diagnosing a patient. Auxiliary duties do not include diagnosis or treatment planning. The dentist has a continuing responsibility for determining the course and sequence of treatment for each patient.

"California law requires the dentist to examine and diagnose all new patients prior to delegating to auxiliaries those general supervision duties which involve treatment.

"In order to comply with the general supervision requirements, a dentist must give specific instructions about patient treatment to auxiliaries sufficient to guide them in performing delegated general supervision duties. For example, 'standing orders' by the supervising dentist instructing that all new patients have x-rays and prophylaxis prior to being seen by the dentist are not specific enough to meet this requirement. In some instances, such treatment may in fact be contraindicated.

"If the office's current practice procedure allows auxiliaries to perform dental treatment procedures on a new patient without specific instructions and prior to the patient having been examined by the dentist, THAT PROCEDURE IS UNLAWFUL AND MUST BE DISCONTINUED. [Capitalization in original.]"

In response to this position statement, the California Dental Hygienists' Association ("CDHA") submitted a Request for Determination to OAL on November 15, 1990. The Request was submitted by Aaron Read on behalf of CDHA. In its Request, CDHA alleges that the position statement states

". . . that it is unlawful for dentists to have auxiliaries perform general supervision procedures on new patients prior to examination of those patients by a dentist. This statement does not appear to have any basis in statute.

". . . .

"It is [our] firm belief that this may be construed as an underground regulation based upon the fact that in its notice of proposed changes, the board stated that existing law does not specifically describe the responsibility of the dentist regarding the treatment of patients. Nor does it specify whether a dentist must examine a patient before a dental auxiliary may perform any functions permitted by law. Yet, Dr. Wasserman's [then president of the Board] letter states that if a dental auxiliary performs dental treatment procedures prior to the patient having been examined by the dentist, THAT PROCEDURE IS UNLAWFUL AND MUST BE DISCONTINUED.

"In addition, the law is silent regarding standing orders in a dental practice. There is nothing in the Dental Practice Act that allows or precludes it. . . . [Capitalization in original.]"

On May 11, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,²⁵ along with a notice inviting public comment.

On June 25, 1990, OAL received the Board's Response to the Request for Determination ("Response"). In its Response, the Board states that

"the letter of the Board is not a policy statement and is specifically referred to as a position statement transmitting information on current law. . . . As such, the challenged 'policy' or 'rule' is not a regulation but is simply a restatement of current law."²⁶

II. ISSUES

There are three main issues before us:²⁷

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY
ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO
THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except
those in the "judicial or legislative departments."²⁸ Since
the Board is in neither the judicial nor legislative branch
of state government, we conclude that APA rulemaking
requirements generally apply to the Board.²⁹

We are aware of no specific statutory exemption which would
permit the Board to conduct rulemaking without complying
with the APA. In fact, Business and Professions Code
section 1614 specifically requires the Board to adopt, amend
or repeal its rules "in accordance with the provisions of
the [APA]." (Section 1614 is quoted above in part under the
subheading "AUTHORITY.")

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULA-
TION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT
CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b),
defines "regulation" as:

" . . . every rule, regulation, order, or standard
of general application or the amendment, supple-
ment or revision of any such rule, regulation,
order or standard adopted by any state agency to
implement, interpret, or make specific the law
enforced or administered by it, or to govern its
procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to deter-
mine whether or not agency rules are "regulations," provides
in part:

"(a) No state agency shall issue, utilize, en-
force, or attempt to enforce any guideline,
criterion, bulletin, manual, instruction,
order, standard of general application, or
other rule, which is a ['regulation'] as
defined in subdivision (b) of Section 11342,
unless the guideline, criterion, bulletin,
manual, instruction [or] . . . standard of
general application . . . has been adopted as
a regulation and filed with the Secretary of
State pursuant to [the APA]"
[Emphasis added.]

In Grier v. Kizer,³⁰ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

If an uncodified agency rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.]³¹

PART ONE: Does the Board's Challenged Position Statement Establish a Rule or Standard of General Application or Modify or Supplement Such a Rule?

The answer to the first part of the test is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³² It has been judicially held that "rules significantly affecting the male prison population" are of general application.³³ There is no doubt that the Board's position statement is a rule of general application. The cover letter, dated September 20, 1989, signed by the Board's president and attached to the position statement, is addressed "Dear Licensee." The cover letter also states ". . . the enclosed Position Statement is being forwarded to fully inform all dental licensees of the requirements of the current law." (Emphasis added.) The Board also states in its Response:

"Applying the two-part test to the Board's statement, it is clear that the initial inquiry must be answered in the affirmative; the statement of law [i.e., the challenged position statement] generally applies to all dentists and dental auxiliaries."³⁴

PART TWO: Does the Challenged Position Statement Establish Rules Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Board or Which Govern the Board's Procedures?

In its Response, the Board argues that "the letter of the Board is not a policy statement and is specifically referred to as a position statement transmitting information on current law."³⁵ (Emphasis added.) However, whether or not an agency's action is regulatory in nature hinges on the effect and impact on the public rather than the agency's characterization of the action.³⁶ It is clear from the 150 or so public comments received from the dental community, regarding this determination, that the challenged "position statement" had an effect and impact on these persons. The Board also argues that its position statement "is simply a restatement of current law." We cannot agree with the Board on this point. For the reasons discussed below, we find that the answer to the second part of the test is also "yes."

The Dental Practice Act and the Board's regulations specifically prohibit anyone from diagnosing, treating, examining or performing any other activity that would constitute the "practice of dentistry" as defined by the act unless that person holds a valid license to practice dentistry. The Legislature, however, recognized the benefit of "the full utilization of dental auxiliaries in order to meet the dental care needs of all the state's citizens,"³⁷ and therefore has permitted the delegation of certain dental care procedures and functions to dental auxiliaries. In furtherance of this delegation, the Legislature instructed the Board to "prescribe by regulation" the functions which may be performed by dental auxiliaries, whether such functions must be performed under the general or direct supervision of a licensed dentist, and the settings where the functions may be performed. The Board has adopted regulations in compliance with this legislative mandate. However, at issue in this determination proceeding is a statement by the Board that was not adopted as a regulation pursuant to APA requirements.

The Dental Practice Act defines "dentistry" and the "practice of dentistry,"³⁸ and makes it unlawful for any person to practice dentistry without a valid license.³⁹

The challenged position statement requires that before instructions may be given by a dentist to an auxiliary to perform dental procedures that are "general supervision duties which involve treatment", the dentist must first examine and diagnose the patient if the patient is a "new patient." The position statement, quoted in full above under the subheading "Background: This Determination," states in part that

"California law requires the dentist to examine and diagnose all new patients prior to delegating to auxiliaries those general supervision duties which involve treatment. . . . [Emphasis added.]"

We were unable to find any California statute, regulation or judicial opinion that imposes such a requirement.

The position statement then declares that

"If the office's current practice procedure allows auxiliaries to perform dental treatment procedures on a new patient without specific instructions and prior to the patient having been examined by the dentist, THAT PROCEDURE IS UNLAWFUL AND MUST BE DISCONTINUED. [Capitalization in original.]"

The challenged position statement clearly interprets, implements and makes specific the Dental Practice Act.

Additionally, Business and Professions Code section 1741, subdivision (d), of the act defines "General supervision" as:

"(d) 'General supervision' means supervision of dental procedures based on instructions given by a licensed dentist but not requiring the physical presence of the supervising dentist during the performance of those procedures. [Emphasis added.]"

Section 1741 does not limit general supervision duties to only dental procedures "which involve treatment," nor does it limit general supervision of dental procedures to those performed only on "new patients." In addition, section 1741 does not specify that a dentist must examine and diagnose a new patient prior to issuing instructions to perform general supervision dental procedures. A presumption may be made that before a dentist can issue any instructions the dentist must first personally examine the patient; however, the rulemaking record for the Board's proposed adoption of section 1066 shows that dentists are, and have been, issuing instructions to perform dental procedures without first examining the patient.⁴⁰ Additionally, the presumption would seem to apply to all patients, not just new patients.

The position statement requires that a dentist first examine only a new patient before giving instructions, not a patient who visits his or her dentist infrequently, such as, once every 3 years or on a "as needed" basis as determined by the patient. This distinction, however, is not made by statute or regulation, but only by the Board in its position statement.

In its position statement, the Board further states in part:

"In order to comply with the general supervision requirements, a dentist must give specific instructions about patient treatment to auxiliaries sufficient to guide them in performing delegated general supervision duties. For example, 'standing orders' by the supervising dentist instructing that all new patients have x-rays and prophylaxis prior to being seen by the dentist are not specific enough to meet this requirement. . . . [Emphasis added.]"

This statement further implements, interprets and makes specific section 1741, subdivision (d). Subdivision (d) defines "General supervision" as the "supervision of dental procedures based on instructions" It does not state that these instructions must be "specific . . . sufficient to guide" the performance of duties. This connotes a standard. The Board made the statute specific by providing the example of "standing orders" to illustrate a situation that would not meet this "standard." Such a standard is not clearly set forth in subdivision (d).

The Board's "position statement" of section 1741 is also not the only interpretation. There have been at least three different documented interpretations of section 1741--one judicial, two administrative.

First, as an exhibit attached to its Response, the Board submitted a copy of a permanent injunction order, issued by the Superior Court of San Diego County, enjoining a dentist and his professional corporation

"from allowing any dental auxiliary employed by Defendants, or working under their supervision, from performing any dental procedure on a person who has not first been personally examined by [the dentist-defendant or a licensed dentist] employed by or associated with [the dentist-defendant]."⁴¹

Though the Superior Court found that the problem predominately arose where the patient had never been seen before by the dentist,⁴² the injunction was broadly written to enjoin any dental procedures on any person who had not first been personally examined by the dentist. The injunction clearly applies to all patients, not just new

ones, and applies to any dental procedure, not just those involving treatment.

Secondly, the Board has interpreted section 1741 in two different ways: (1) the Board's current position statement, and (2) proposed regulation section 1066.⁴³ The Board's position statement requires a dentist to examine and diagnose a new patient before instructing a dental auxiliary to perform general supervision duties involving treatment. The Board's proposed regulation section 1066, on the other hand, requires a dentist (1) to review a patient's medical and dental history, (2) perform preliminary extra-oral and intra-oral examinations and (3) determine the course or sequence of treatment for a patient not previously seen by that dentist before a dental auxiliary may perform any procedure on the patient. Section 1066 then sets forth certain exceptions--general supervision duties which a dental auxiliary may perform, if permitted by law for that classification of auxiliary, prior to any examination of the patient by the dentist.

In the "Notice of Proposed Changes" regarding proposed regulation section 1066, the Board states:

"Existing law does not specifically describe the responsibility of the dentist regarding the treatment of patients. Nor does it specify whether a dentist must examine a patient before a dental auxiliary may perform any of the functions permitted by law to be assigned to such auxiliary. [Par.] . . . It would also specifically direct the order in which dental functions could be performed on a patient and would prohibit a dental auxiliary from performing any function (except one of the four enumerated functions) until the dentist had first reviewed the patient's histories, performed a preliminary extra-oral and intra-oral examination and determined the course or sequence of treatment for that patient. These requirements would apply to 'first time' patients not to patients previously seen by the dentist. [Emphasis added.]"

The Board's "Initial Statement of Reasons" for proposed section 1066 states:

"Based on testimony presented at the hearings, it appears that the law is unclear and could permit dentists to allow auxiliaries to perform perhaps unnecessary x-rays and prophylaxis before a diagnosis had been made by the dentist. Testimony was presented to the Board which included examples of situations where unnecessary treatment was being rendered by auxiliaries on patients not yet seen by the dentist. The Board concluded that while it would not be appropriate to define 'patient of record',

clarification was needed with regards to the responsibilities of a dentist regarding the dental procedures which could be performed by auxiliaries before examination, diagnosis and treatment has been rendered by the dentist.

In the Board's "Final Statement of Reasons," the Board further stated:

" . . . It was determined by the Board that based on the testimony provided by all persons [over 100 commenters] actually participating that clarification was needed to existing statutes and regulations. . . . The evidence was overwhelming that many dentists do not understand whether or not they should diagnosis prior to delegating auxiliary duties. [Emphasis added.]"

Also, as part of the Board's "Final Statement of Reasons," the Board included a "Summary of Comments and Responses," which is a summary of the testimony of numerous interested parties received during a hearing concerning proposed section 1066 and the Board's response to the comments. In one of its responses, the Board states:

"The regulation [proposed section 1066] is setting a standard of care for the profession by providing guidelines so the dentist is very clear exactly what his responsibilities are to the patient. [Emphasis added.]"

The notice of proposed action, the initial statement of reasons, and the final statement of reasons are part of the rulemaking record for the proposed regulatory action to adopt section 1066. The rulemaking record clearly shows that the Board is aware of the need for further interpretation of the Dental Practice Act. In order to provide this interpretation, the Board issued the challenged position statement which interprets, implements and makes specific the Dental Practice Act that is administered and enforced by the Board.

WE CONCLUDE THEREFORE that the challenged position statement is a "regulation" as defined by Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.⁴⁴ Rules concerning certain activities of state agencies--for instance, "internal management"--are not

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subject to the procedural requirements of the APA.⁴⁵
However, none of the recognized exceptions (set out in note 45) apply to the challenged position statement.

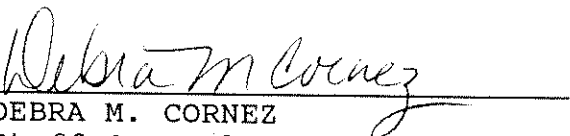
III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged Board statement is a "regulation" as defined by Government Code section 11342, subdivision (b);
- (3) the statement is not exempt from the requirements of the APA; and therefore,
- (4) the statement violates Government Code section 11347.5, subdivision (a).

DATE: November 9, 1990


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1. This Request for Determination was filed by Aaron Read on behalf of the California Dental Hygienists' Association, 1127 Eleventh Street, Suite 350, Sacramento, CA 95814, (916) 448-3444. The Board of Dental Examiners was represented by Georgetta Coleman, Executive Officer, 1430 Howe Avenue, Suite 85B, Sacramento, CA 95825, (916) 920-7451.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "451" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 13 (Department of Finance, November 2, 1990, Docket No. 89-019), California Regulatory Notice Register 90, No. ___-Z, page ___, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"Determination" means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 219 Cal. App. 3d at p. 434, 268 Cal.Rptr. at p. 251.

Concerning the treatment of 1987 OAL Determination No.10, which was submitted to the court for consideration in the case, the court further found

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if

circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

Approximately 150 public comments were submitted in this proceeding; some of the comments represented large groups or professional associations. The majority of the comments were from dental hygienists and members of the public who opposed the Board's "position statement."

The Board's Response to the Request for Determination was received by OAL on June 25, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Center for \$3.00 (or \$4.65 if mailed).

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of gen-

eral application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
1. File its determination upon issuance with the Secretary of State.
 2. Make its determination known to the agency, the Governor, and the Legislature.
 3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.
11. Statutes 1885, p. 110.
12. Ex parte Whitley (1904) 144 Cal. 167, 169.
13. See Business and Professions Code sections 101 and 1601.
14. See Business and Professions Code section 1611.
15. Today, the Board consists of eight practicing dentists, one registered dental hygienist, one registered dental assistant, and four public members. See Business and Professions Code section 1601.
16. Webster v. Board of Dental Examiners (1941) 17 Cal.2d 534, 536-537.
17. This classification of dental assistants are not licensed by the Board. Government Code section 1750 defines "dental assistant" as "as person who may perform basic supportive dental procedures as authorized by this article under the supervision of a licensed dentist."
18. See Business and Professions Code sections 1751, 1754, 1757, 1759 and 1761, respectively.

19. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

20. Section 1701, subdivision (f) of the Business and Professions Code sets forth the penalty for practicing dentistry without a valid license:

"Any person is for the first offense guilty of a misdemeanor and shall be punishable by a fine . . . or by imprisonment in the county jail . . . or both, . . . and for the second or a subsequent offense is guilty of a felony and upon conviction thereof shall be punished

by a fine . . . or by imprisonment in the state prison,
or by both . . . who:

.

(f) Practices dentistry or offers to practice dentistry as it is defined in [the Dental Practice Act], either without a license, or when his license has been revoked or suspended. . . .
[Emphasis added.]"

21. Business and Professions Code section 1740.
22. Generally speaking, a dental assistant may perform basic supportive dental procedures under the general supervision of the supervising dentist. (Cal. Code Regs., tit. 16, sec. 1085.) A registered dental assistant may perform all functions that a dental assistant may perform, plus other duties requiring more skill and training. (Cal. Code Regs., tit. 16, sec. 1086.) A registered dental assistant in extended functions may perform all duties that a dental assistant and registered dental assistant may perform, plus other duties requiring more skill and training. (Cal. Code Regs., tit. 16, sec. 1087.)

A registered dental hygienist may perform all functions performed by a dental assistant and a registered dental assistant, plus other duties requiring more skill and training. (Cal. Code Regs., tit. 16, sec. 1088.) A registered dental hygienist in extended functions may perform all duties performed by dental assistants, registered dental assistants and registered dental hygienists, plus other duties requiring more skill and training. (Cal. Code Regs., tit. 16, sec. 1089.)
23. The Board's notice was published in Register 88 No. 48-Z, November 25, 1988, pp. 3770-3771.
24. For the proposed section 1066, the Board cited Business and Professions Code section 1614 as the "Authority" citation, and sections 1625 and 1626 as the "Reference" citations.
25. California Regulatory Notice Register 90, No. 19-Z, May 11, 1990, p. 759.
26. In its Response, the Board also makes the following statement:

". . . This response is submitted with the clear expectation that the matter has not been irreversibly prejudged by the conclusions set forth in the extraordinary letter of February 19, 1990 from [then] OAL Director Linda Brewer to the Honorable Rusty Areias of the State Assembly declaring the Board statement to be a rule. Similarly, it is expected that the phrasing of the question by OAL as a 'policy' (Nov. 22, 1989 OAL Notice of Acceptance) and 'rule' (May 15, 1990 OAL Notice Concerning Agency Response) does not constitute a prejudgment of the matter. . . ."

OAL assures the Board that no prejudgment existed regarding the Board's challenged statement prior to issuing this Determination. This Determination is based on the Request for Determination, the public comments received, the Board's Response and the research and analysis of applicable law. Former Director Brewer's letter reflected only her personal opinion and was not issued pursuant to Government Code section 11347.5. Ms. Brewer left OAL effective September 4, 1990. On September 30, 1990, John D. Smith was appointed director of OAL. This determination was approved by Director Smith.

Additionally, as noted in the text of the Determination, whether or not an agency's action is regulatory in nature hinges on the effect and impact on the public rather than on the characterization or labeling of the agency's action as a "policy," "rule," "statement," or "position statement." See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744.

27. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
28. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

29. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
30. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
31. Id., 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.
32. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
33. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736 188 Cal.Rptr. 130, 135; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
34. Board's Response, p. 2.
35. Board's Response, p. 1.
36. Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744.
37. Business and Professions Code section 1740.
38. Business and Professions Code section 1625.
39. Id., section 1626.
40. See dentist's comments in the rulemaking record for proposed regulation section 1066.
41. California Dental Association, et al. v. Howard B. Feffer, D.D.S., et al., Superior Court San Diego County, September 26, 1983, No. 470802,.

42. See Judge Buttermore's letter, dated July 26, 1983, page 4, which was submitted with the injunction order.
43. We note that the Board cited Business and Professions Code sections 1625 and 1626 as section 1066's "Reference" citations, and did not include section 1741. This omission, however, would not have prevented OAL from determining that proposed regulation section 1066 also implements, interprets or makes specific section 1741 during its review of section 1066 if section 1066 had been submitted to OAL for formal adoption pursuant to the APA.
44. Government Code section 11346.
45. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans

Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncoded agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA